No. 15670

United States Court of Appeals
For the Ninth Circuit

NORTHWEST AIRLINES, INC., *Appellant,*

vs.

GERALDINE B. GORTER, as Administratrix of the Estate of John M. Waldrep, Deceased, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

PETITION FOR REHEARING

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INDEX

TABLE OF CASES

COURT RULES

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In remanding the instant case and permitting appellant to amend its answer, the court invokes Federal Rule of Civil Procedure 15(b), wherein it is provided that:

> "*Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the

> merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

It is the belief of the appellee that the application of this rule and the resulting conclusion of the court, was based upon a fundamental misunderstanding of the record, and that when the record is correctly considered, that the application of the appellant to amend (coming as it did twenty-eight days after the conclusion of the trial and announcement of the oral decision of the court) was properly denied.

The decision of the lower court should be affirmed, or, in the alternative, this petition should be granted, for the reasons that:

1. This Court's decision is based upon a misunderstanding of the record. Proper consideration of the record requires a result contrary to the results reached in the court's opinion.

2. Federal Rule of Civil Procedure 15(b) has no application herein.

3. The trial court correctly exercised its discretion. A contrary finding results in serious prejudice to appellee.

4. The proposed amendment does not present a legally sufficient defense.

5. There was no "excusable neglect" on the part of the appellant, but in fact there was a complete lack of diligence on its part.

1. Misunderstandings of the Record

As has been suggested, appellee respectfully submits that this Court misunderstood the record on two material points. The first misunderstanding is quite apparent from the Court's statement that:

> "Gorter's objection that she has not the funds to pay for an investigation of the law of the Dominion is no more a ground for refusing the right to amend than if it had been claimed as a ground for dismissing the answer." (Court's Opinion, p. 3, March 28, 1958)

No such objection was made in the consideration of this amendment. The reference thereto concerned a previous motion to amend by the appellant, made before trial wherein the appellant, for the first time asked leave to plead a foreign law (Families' Compensation Act of British Columbia) as applicable to the case at bar (R. 45, 46). That motion was made more than three years after the service of the Summons and Complaint and approximately one month prior to trial. Plaintiff objected to its timeliness but the court granted leave to amend and the amended pleading became an acknowledged issue in the trial of the case. Pursuant to that amendment the appellee did expend her funds, did make an investigation of the law of the Dominion of Canada and did proceed to trial on the basis of the amended pleading.

However, the motion with which we are now concerned was first filed with the court after completion of the trial, twenty-eight days after the announcement of the court's oral decision and one day prior to the formal entry of the Findings of Fact and Judgment in the ac-

tion (R. 58, 92). It was denied by the trial court on the day of the entry of the final judgment. Actually there is nothing in the record to show on what basis the trial court, exercising its discretion, denied the motion. Thus, the reference to "Gorter's objection" in the court's opinion is in error.

The second misunderstanding of the record is even more grave. In the court's opinion the statement is made that:

> "Evidence of the law of Canada had been objected to at the hearing as being beyond the scope of the pleadings and no showing was made that the omission of the evidence to sustain the motion for the amended pleading would prejudice Gorter." (Court's Opinion, p. 3, March 28, 1958)

No attempt was made by any witness, by pleading, by trial amendment, by offer of proof, or in any other fashion to introduce the subject matter of the post-trial amendment (Canadian law applicable seaward of low water mark) at the time of trial. This is conceded even in appellant's affidavit in support of the subject amendment, wherein it is stated:

> "However the court in its oral decision found that the accident did not occur in British Columbia, and defendant is now for the first time confronted with this assertion. *Prior to this time, defendant had no occasion to plead and prove the law existing outside of British Columbia, and any attempt to do so would have been improper and objectionable.* It was only after the court's finding that the law outside of British Columbia became pertinent and applicable." (R. 59) (Emphasis supplied)

Perhaps this Court's misunderstanding of the record

was based upon appellant's completely erroneous statements made throughout its opening brief and its reply brief, that an attempt was made by appellant to introduce the law of Canada seaward of low water, and that the court denied the introduction of such evidence. A careful reading of the testimony involved, and we urge the court's scrutiny thereof, makes it clear that appellant was only attempting to prove that by Canadian law the province of British Columbia had been given exclusive authority to legislate within its territorial jurisdiction and that no Canadian statute superseded the British Columbia statute applicable within that territorial limit. This is true of the record as a whole and particularly true of the testimony of appellant's witness, Mr. John Bird, quoted in appellant's brief and set forth in the record (R. 1024-1042). It is even conceded by appellant, as shown above, in the very affidavit submitted in support of the motion to amend.

2. Federal Rule of Civil Procedure 15(b) Has No Application Herein

This rule appears to be primarily directed toward the allowance of amendments to conform pleadings to the evidence, when issues not within the pleading are tried by express or implied consent of the parties or when evidence is offered by one party and objected to *at the trial* on the ground that it is not within the issues made by the pleadings. This latter portion of the rule, quoted by the court, assumes that the evidence is offered during trial and the objecting party heard at the trial on the question of prejudice. With a proper understanding of the record in this case, particularly the

fact that no evidence was offered by the appellant concerning the law of Canada applicable seaward of low water mark, it is difficult to understand the formal application of this rule to this case. Likewise, in view of the tardiness of the application to amend there is nothing in the record to show whether or not the trial court found prejudice. Bearing in mind that the amendment was not argued until the date the Findings of Fact and Judgment were entered, this is not surprising, and the record, as made, does not afford this Court the opportunity to determine that there was, in fact, no prejudice.

It is axiomatic that the right to amend is addressed to the sound discretion of the trial court within the purview of the Federal Rules of Civil Procedure and will only be disturbed for gross abuse of discretion. The Federal courts, including this Court, have announced the rule as such.

Heay v. Phillips, 201 F.2d 220 (9th Cir.):

> "Courts are given wide discretion in granting or refusing leave to amend after the first amendment, and only upon *gross abuse* will their rulings be disturbed. Wittmayer v. U. S., 9th Cir. 1941, 118 F.2d 808, 809 . . . " (Emphasis supplied)

Lorentz v. R.K.O. Radio Pictures, 155 F.2d 84 (9th Cir.) Cert. denied 329 U.S. 727, 91 L.Ed. 629:

> "It was not error for the court to deny appellant the opportunity to amend his complaint. He did not request permission to do so in the trial court except as to certain minor details for which permission was granted. There was no suggestion in the complaint of fraud or mistake and no presentation of facts which would be pertinent to a defense based upon waiver or estoppel which he

now asks the opportunity to allege and prove. If appellant had evidence as to any such defenses he should have filed counter-affidavits in the summary judgment proceedings. Nahtel Corporation v. West Virginia Pulp & Paper Company, 2nd Cir. 1944, 141 F.2d 1. The allowance of amendments after issue joined is discretionary with the trial court and refusal of leave to amend is ground for reversal only upon abuse of discretion. U.S. v. Lehigh Valley R. Co. 1911, 220 U.S. 257, 31 S.Ct. 387, 56 L.Ed. 458; Maryland Casualty Co. v. Hosiner, 1st Cir. 1937, 93 F.2d 365; O'Quinn v. U.S., 5th Cir. 1934, 70 F.2d 599."

3. The Trial Court Correctly Exercised Its Discretion. A Contrary Finding Results in Serious Prejudice to Appellee.

It might be well to examine the state of the record before the trial court at the time of its ruling on this motion. The complaint had been filed in this case more than three years prior to the date of the trial. During motion procedure in the early stages of this litigation appellee had advised appellant by memorandum filed with the court that in the absence of appellant's proper pleading of law at the place of impact, that the Washington rule of presumption would apply (R. 21, 22). Approximately one month before trial the parties were ordered by the court to prepare their proposed pretrial order. At that time appellant first proposed an amendment to plead foreign law, purportedly applicable at the place of impact. Appellee objected to the timeliness of this motion on the grounds that it would result in economic hardship to plaintiff Gorter to obtain a briefing and proper presentation of foreign law

at that stage of litigation. Nevertheless, the trial court, exercising its discretion, allowed the amendment. Thereupon plaintiff prepared her case, expended her funds, went through pre-trial procedure, and tried the case over a period of weeks upon the issues framed pursuant to an amendment made one month before trial.

Inherent in the appellee's theory of the case pursuant to that amendment was the applicability of the *British Columbia statute at the situs of the accident.*

The trial court found, as a result of the evidence so submitted, that the British Columbia death statute did not cover the area where the plane landed and the death occurred, a holding which the Appellate Court now affirms.

It is apparent from the trial record that both parties, particularly appellant, recognized that there was an issue as to whether or not the Families' Compensation Act of British Columbia applied at this location. This is perhaps best illustrated by the evidence adduced by the appellant itself on its case in chief wherein it attempted to prove the location to be landward of low water mark, called witnesses to so testify and even went so far as to call a tide expert on this point. Appellant understood the issues involved in this proceeding.

Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (Cir. Crt., D.C.):

> "If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of

notice then must be, but the actuality, not the technicality, must govern."

The amendment now proposed is not offered in support of proffered evidence, nor upon an offer of proof. It is purely and simply an attempt to now try the case on a different state of facts, of which the appellant was aware prior to the trial.

A strikingly similar case to the instant case is *Banking and Trading Corp. v. R.F.C.,* 15 F.R.D. 360 (U.S. D.C. N.Y. 1954). In the cited case, defendant moved to amend its answer to include the defense that plaintiff lacked capacity to sue. Defendant admitted that if the motion were granted, plaintiff might be barred by a statute of limitations. As in the present case, the defendant had delayed three years before attempting to raise the defense. Recognizing the inherent prejudice to the plaintiff in the cited case, the court said:

> "It is true that amendments to pleadings are liberally granted in the Federal courts. Nevertheless, permission to amend, when the parties may no longer do so, by right, as in the case here, lies within the court's discretion and is to be freely granted in those instances where justice so requires. No reason has been shown by defendant to justify permitting its proposed defense at this late date. Indeed there are convincing reasons why the defense should be barred. The action was begun almost three years before the present motion was made. The defendant served both an answer and an amended answer without raising the issue of plaintiff's capacity to sue. . . . Furthermore, defendant has openly admitted that if its present motion is granted it will raise the defense of the statute of limitations as a bar to any attempt

> by plaintiff to amend its complaint. . . . Thus, *to grant the amendment would be to reward the defendant for its own neglect in failing to assert sooner, an alleged defense.* . . . I am saying that in the interests of justice and expedition, *the defendant's neglect should not form the basis for a decided advantage to it* and if not certainly at least the possibility of getting plaintiff out of court." (Emphasis supplied) 15 F.R.D. at 361, 362.

The instant case is, in fact, an *a fortiori* situation since this proposed amendment came even after the conclusion of the trial and the announcement of the court's oral decision.

4. The Proposed Amendment Does Not Present a Legally Sufficient Defense

In addition to the requirement that the admission of evidence and proposed amendment must not prejudice the opposing party, a further requirement of Rule 15(b) is that the presentation of the merits will be subserved unless the amendment is allowed.

If it were admitted arguendo that a cause of action for wrongful death is foreign to the common law and is a creature of statute, and if it were further admitted arguendo that there was no such statute at the place of impact, the affidavit submitted in support of the motion to amend is still incomplete. Obviously such application of fundamentals assumes that the cause of action was created in the territory so affected, but the law of Canada as shown by the evidence and testimony of Mr. Cunningham, Chairman of the Maritime Law Subsection of the Canadian Bar Association for British Co-

lumbia, and a member of the Air Law Subsection for British Columbia for the Canadian Bar Association, is that where the wrongful acts occurred outside of that jurisdiction the law of the place where the negligence occurred governs.

> "The second reason is that even if the wrongful act or acts of negligence occurred above low water, under our law the tort is deemed to be committed where the wrongful acts take place and not necessarily where the injury is received. Even if the wrongful act or acts occurred in the air or in British Columbia it would be my opinion in the facts stated, including the fact that the deceased was a United States citizen, the aircraft was a United States aircraft, and the corporate aircraft carrier was domiciled in the United States, that the court in British Columbia would apply the law of the United States." (R. 1066)

In the instant case the wrongful acts occurred outside of the jurisdiction of the place of impact and primarily within the State of Washington, where patently a statute exists permitting the plaintiff's suit. *The testimony of Mr. Cunningham is not disputed in the affidavit.* Thus, the affidavit is obviously incomplete on its face and cannot be deemed to state an adequate defense.

5. There Was No "Excusable Neglect" on the Part of the Appellant, But in Fact There Was Complete Lack of Diligence on Its Part

While this Court's decision that the post-trial amendment should have been allowed is based upon the misunderstanding that appellant offered evidence pertaining to Canadian law applicable seaward of low water,

the affidavit in support of the amendment affirmatively denies that any evidence of the Canadian law applicable seaward of low water was offered. Instead the affidavit relies solely on "surprise" (R. 59). The court's opinion appears to accept this explanation by alluding to appellant's failure to meet the proper issues of the case as "excusable error." It is difficult to take this claim of surprise seriously. Often litigants are surprised that a court finds against them on a question of fact, but when the fact sought is inherent in the assertion of the defense itself, the finding can hardly be classified as "surprise." As has already been seen, the complaint had been on file for approximately three years. Defendant, for the first time, sought to plead the applicability of foreign law one month before the trial and set forth the alleged applicability of the Families' Compensation Act of British Columbia as a defense. Obviously, in order to avail itself of this defense it was incumbent on the defendant to show that the Families' Compensation Act of British Columbia was *the law of the place where the accident occurred* and that it was the sole and exclusive remedy at that governing point. This was a fact necessary to its defense and recognized as such during the trial. It is repetitious to refer again to the testimony of the defendant's own witnesses on this very point and its serious attempts to relate their testimony to a location landward of low water mark. Recognizing that a favorable finding on this particular point was essential to its defense, how can its own failure of proof, at this point, be classified as "excusable error"?

Having failed to so prove the defendant now, belatedly, attempts to state that it really didn't make any difference where the accident occurred, that regardless of location, the plaintiff's action is barred. The defendant investigated the accident, knew where it happened, was on the scene immediately thereafter, was represented by able counsel and certainly must have anticipated many weeks before, the defense which it now seeks to assert. It would seem that the most ordinary kind of diligence would require the assertion of the now purported defense, prior to a costly trial. If the defense in fact existed, it was there to see, and the simplest form of pleading or offer of proof would have brought it to the court's attention. Again referring to *Kuhn v. Civil Aeronautics Board (supra),* the language of the court is particularly pertinent:

> "If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice then must be, but the actuality, not the technicality, must govern."

It is, of course, the position of the appellee that even had it been so presented, it was not an adequate defense. This has been referred to *supra,* but the failure of the zealous attempt to prove one set of facts, and to now assert a possible defense which the most casual consideration would have disclosed, is hardly, in the opinion of the appellee, "excusable error."

Appellee submits that the probable answer to this gross lack of diligence is that appellant recognized at

all times the inadequacy of the defense it now sets forth in its proposed amendment and elected to try its case on what appeared to it as being a stronger position. But even if there is some other explanation for appellant's neglect, the fact remains that to grant the amendment at this time, would be to reward the appellant for its own neglect in failing to assert sooner an alleged defense. That appellee Gorter would be correspondingly prejudiced goes without saying. The lower court's discretion in this matter should be affirmed by this Court.

Respectfully submitted,

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Counsel for Appellee certify that in their judgment this Petition for Rehearing is well founded and is not interposed for delay.

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